No. 09-804

In The
Supreme Court of the United States

CIGNA CORPORATION and CIGNA PENSION PLAN,
Petitioners,
v.

JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S. GLANZ, Individually and on Behalf of All Others Similarly Situated,
Respondents.

**On Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit**

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a district court, after finding material omissions and misleading statements in summary descriptions in violation of ERISA's disclosure requirements and unrebutted likely harm to employees from the violations, cannot order relief unless the district judge conducts individual hearings (in this case involving as many as 27,000 plaintiffs) to determine how each employee "detrimentally relied" on the omissions and misleading statements.

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In addition to the authorities in Petitioners' Appendix, this case involves ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D), 29 C.F.R. 2520.102-2 and –3(l) and 29 C.F.R. 2520.104b-3. In pertinent part:

ERISA §404(a)(1)(D) provides that "a fiduciary shall discharge his duties…in accordance with the documents and instruments governing the plan insofar as [they] are consistent with the provisions of this title and title IV."

29 C.F.R. 2520.102-2 provides that "[t]he format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant."

29 C.F.R. 2520.102-3(l) provides that the summary plan description shall include "a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery…of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k)."

29 C.F.R. 2520.104b-3 provides that a plan administrator "shall…furnish a summary description of any material modification to the plan and any change in the information required by section 102(b) of the Act and § 2520.102-3 of these regulations to be included in the summary plan description to each

participant covered under the plan and each beneficiary receiving benefits under the plan."

STATEMENT

This case grows out of CIGNA's conversion of its traditional defined benefit pension plan to a "cash balance" design effective January 1, 1998. In that conversion, CIGNA promised employees that the cash balance plan would result in benefit "enhancements", Pet.App. 31a, 34a, with steady "growth" in benefits after the conversion and "comparable" or "larger" benefits in the long-run. *Id*. at 37a. Employees were promised that "[e]ach dollar's worth of credits is a dollar of retirement benefits payable to you." *Id*. at 36a, 40a. These promises were made in the summary descriptions which ERISA requires to be distributed to employees as the primary means of communicating their benefit rights.

After a seven-day bench trial, the district court concluded that the promises that CIGNA made were false or misleading because, as CIGNA knew, the terms of the formal plan documents led to periods of "wear-away" in which no benefits were earned and to significantly lower benefits after those periods ended. Pet.App. 25a-26a, 101a-103a, 121a-123a. CIGNA's failure to disclose the periods of wear-away and benefit reductions meant that employees continued to provide their labor to CIGNA (and in some cases accepted offers to return to CIGNA) not knowing that their total compensation was being cut. The district court found that "CIGNA wished to avoid the employee backlash likely to result from a thorough discussion" of the effects of the conversion it planned, and "sought to negate the risk of backlash by producing affirmatively and materially misleading notices" regarding the actual effects of the conversion. Pet.App. 114a. CIGNA did not appeal any of these findings.

Congress adopted ERISA §102, 29 U.S.C. §1022, to address the deficiencies in disclosures that Congress found before ERISA. ERISA §102(a) requires a "summary plan description" ("SPD") to be distributed to employees that is "sufficiently accurate and comprehensive to reasonably apprise such participants …of their rights and obligations under the plan." When a material change is made to a plan's terms, a "summary of material modification" (SMM) must be distributed. *Id.* Both documents must be "written in a manner calculated to be understood by the average plan participant." *Id.*

Eleven circuits have held that when a description of benefits in a summary plan document conflicts with the terms of the formal plan documents, the summary description controls. *See* p. 27, *infra*. The circuits have disagreed only on whether the summary description controls once a material conflict is shown (the Third, Fifth and Sixth Circuits[1]), or whether the plaintiff or plaintiffs must also show "likely harm" from the conflict which the defendant can rebut by showing "harmless error" (the Second Circuit[2]), or "some significant reliance

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[1] *See Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003); *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458-59 (5th Cir. 2007); *Edwards v. State Farm Mutual Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988).

[2] *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 110 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004).

upon, or some possible prejudice flowing from, the faulty plan description" (the First, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits[3]).

In its brief, CIGNA contends that its current and former employees should not be able to recover for the undisclosed periods of wear-away without "individualized" showings of "detrimental reliance" on the now-concededly "totally inadequate" summary descriptions. CIGNA contends that "each" of the 27,000 plan participants should be required to testify in person that he or she: (1) read the totally inadequate summary descriptions, (2) was deceived into believing that the conversion had no periods of wear-away, and (3) would have taken some specific employment or retirement action if he or she had known that no additional retirement benefits were being earned for a period of years. CIGNA Br. 38-39.

CIGNA does not ground its request for subjective "state of mind" testimony from 27,000 individuals on any statutory text, but contends that this Court should require this as a matter of "federal common law" consistent with "maintaining the plan's long

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[3] *See Govoni v. Bricklayers, Masons & Plasterers Local 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (Breyer, J.); *Aiken v. Policy Mgmt. Systems Corp.*, 13 F.3d 138, 141 (4th Cir. 1993); *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1998); *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 621 (8th Cir. 1998); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1999); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-79 (11th Cir. 1992).

The Ninth Circuit appears to agree with the position of the Third, Fifth and Sixth Circuits. See *Bergt v. Ret. Plan for Pilots Employed by Mark Air, Inc.*, 293 F.3d 1139, 1145 (9th Cir. 2002). The D.C. Circuit has not addressed the issue.

term financial stability." Br. 26-28, 35. The plain result of CIGNA's proposed rules would be to impose tremendous burdens on the trial court and the members of the class, while CIGNA would have no burden "at all." Suppl. Pet.Br. at 9. Under CIGNA's scheme, participants could never win on summary judgment and could never prevail in a class action without testimony from each individual class member. Predictably, an overwhelming percentage of this nationwide class would not participate in any such proceedings and CIGNA would only have to pay its current and former employees a small fraction of the benefits that were lost under its deliberately undisclosed "wear-away" design.

1. CIGNA's Conversion to a Cash Balance Plan

As is widely-recognized, conversions of traditional defined benefit pension plans to "cash balance" plans were part of an "effort to curb costs by, inter alia, scaling back the benefits provided under pension plans." *Depenbrock v. CIGNA Corp.*, 389 F.3d 78, 79 (3d Cir. 2004). Unlike many cost-curbing measures, cash balance conversions often hid this objective. The *Wall Street Journal* quoted an actuary from the consulting company credited with developing the cash balance design: "If you decide your plan's too rich, and you want to cut back, ... changing to a different type of plan will let you do that *without being obvious about it.*" Record 262 (Pl. Trial Ex 67) (emphasis added).

In a July 1996 PowerPoint presentation, CIGNA's consultant, Mercer, touted one of the advantages of a cash balance conversion as the ability to "mask[] a cut in pension plan benefits" from employees. JA 808a. A May 5, 1999 *Wall Street Journal* article quoted actuarial consultants, including from Mercer, joking at a Society of Actuaries' meeting about how employees were fooled: "You switch to a cash-balance plan where people are probably getting smaller benefits, at least the older-longer-service people; but they are really happy and they think you are great for doing it." "It is not until they are ready to retire that they understand how little they are actually getting." "Right, but they're happy while they're employed." Record 262 (Pl. Trial Ex. 67).

Effective January 1, 1998, CIGNA moved more than 27,000 employees from its traditional defined benefit plan to a cash balance plan. Pet.App. 16a-17a. Several thousand relatively older, longer-service employees including CIGNA's CEO were grandfathered under the traditional plan. *Id*. at 16a, JA 756a. As was typical in conversions to cash balance plans, the benefits employees had earned under the prior plan were "frozen" and in this case called "Part A" benefits. Pet.App. 14a-17a. Benefits under the new cash balance plan were called "Part B" benefits. *Id*. at 16a-18a. Although some employers provided "A plus B" benefits after cash balance conversions, CIGNA's plan provided that employees would receive the "greater of A or B." *Id*. at 13a-14a. Because CIGNA provided that each participant would have an opening Part B account based on the value of his or her Part A benefit, CIGNA's plan still appeared, on the surface, to promise that employees would receive the value of their Part A benefits plus their new cash balance benefits under Part B.

Employees did not know they were unlikely to get anywhere close to the same benefits under the new plan because of undisclosed choices CIGNA made in calculating the value of the opening Part B account and because the future formula was designed to offer much lower benefits than before. Pet.App. 23a-27a. Those undisclosed choices made the value of the opening Part B account lower than the value of the Part A annuity benefit. This involved assumptions relating to interest rates and mortality risk, as well as CIGNA's decision not to include the value of certain early retirement benefits in calculating the opening Part B accounts (*Id*. at 23a-27a). When the Part B opening balance was lower than the Part A benefit, it might take many years before the difference was "worn away" so that the value of the Part B account exceeded the value of the Part A benefit. *See* Pet.App. 25a. These were complex matters of a sort that a lay person would be unlikely to comprehend even if he or she were to read the formal plan documents.

Ultimately, almost all of the participants who were moved to the cash balance formula received lower benefits than if the conversion had not occurred, and lower benefits than if an "A plus B" transition had been used. The older, longer-service employees who were not grandfathered (like named plaintiffs Amara and Broderick) were hardest hit. The conversion resulted in periods of wear-away with no additional benefits for approximately 21,000 of CIGNA's 27,000 employees and lower future benefits for virtually everyone who was not grand-fathered. Pet.App. 101a-103a, 199a. A few years after the conversion at issue here, Congress amended ERISA so that it is now illegal to design a cash balance conversion with "wear-aways," with or without full disclosure. Conversions must now always provide for at least an "A plus B" transition. 29 U.S.C. §

1054(b)(5)(B)(iii), as amended by P.L. 109-280, §701(a)(1).

2. The Decisions Below

This case was decided after a seven-day trial. The trial judge, Judge Mark R. Kravitz of the District of Connecticut, heard testimony from nine lay witnesses and three experts and admitted more than 500 exhibits into evidence. CIGNA did not appeal any of the trial court's findings.

The district court found that CIGNA failed not only to disclose reductions for those who were transferred to cash balance, but affirmatively misled participants in its ERISA §204(h) notice, SMM, and SPD. The district court found that CIGNA portrayed a large benefit reduction as an "enhancement" that offered "comparable" or "larger" benefits with no "cost savings" for CIGNA. Pet.App. at 31a, 34a, 37a; *see* JA 990a, 993a, 947a-948a, 952a. CIGNA told the employees that "you will see the growth in your total retirement benefits from CIGNA every year" and that "each dollar's worth of credits is a dollar of retirement benefits payable to you." Pet.App. 36a-37a; *see* JA 906a, 928a, 952a, 963a. CIGNA also misled employees into "believ[ing] that their early retirement benefits were fully protected as part of their minimum benefit and/or their opening account balance under Part B." Pet.App. 129a. CIGNA's claims were false because the plan resulted in periods of "wear-away" where participants continued to work without earning additional benefits and much lower benefits after the wear-away periods ended. Pet.App. 25a-26a, 121a-123a. For example, CIGNA's wear-away design reduced Ms. Amara's existing benefits to "less than half" of their previous level so it "would take over 10 years" before her cash balance benefits would catch up. *Id.* at 23a, 25a.

The district court found that "[w]ear away means that there are periods of time in which the employee's account balance is less than the employee's minimum benefit." Pet.App. 24a-25a. "[I]n effect, where there is wear away, even though the employee continues to work for CIGNA and continues to receive benefit credits, the employee's expected retirement benefits have not grown beyond what the employee was entitled to under [CIGNA's Pension Plan] as of December 31, 1997." *Id.* at 25a. The district court determined the periods of wear-away were "predictable and known to CIGNA," Pet.App. 119a, and that "CIGNA was aware of the significant reduction in the rate of future benefit accrual." *Id.* at 114a.

The district court found that CIGNA's disclosures were "inadequate under ERISA and in some instances, downright misleading" and that CIGNA engaged in "efforts to conceal the full effects" of the changes "to avoid the employee backlash likely to result from a thorough discussion" of the reductions and periods of wear-away. *Id.* at 8a, 114a, 137a. The court found that CIGNA instructed its consultant (Mercer) "not to compare the old to the new plans" in drafting communications for employees. *Id.* at 112a; *see* JA 817a. After CIGNA distributed its SMM and SPDs to employees, CIGNA also instructed its own benefits personnel "NOT" to provide accurate comparative information in written communications or in response to individual inquiries. *Id.* at 112a-113a; *see* JA 834a-837a.

The district court determined that "CIGNA had a duty to inform plan participants of the possibility of wear away in its notices and disclosures regarding Part B.... The possibility of wear away was certainly a material fact regarding Part B, as some CIGNA employees' pension benefits did not grow for several years as a result of the phenomenon." *Id*. at 123a. The Court found that "CIGNA admit[ted] that it nowhere informed its employees that they might not be accruing benefits under Part B." *Id*. at 118a-119a.

In addition to the findings concerning the inadequacy of CIGNA's disclosures, the district court made a number of findings relevant to whether employees suffered "likely harm" as a result, as required by the Second Circuit's decision in *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004). The district court found that CIGNA knew that employee protests at other companies like Deloitte & Touche had "resulted in partial or complete rollbacks of the proposed changes." *Id*. at 113a-114a; *see* JA 766a-767a & 874a-892a. Because "[t]he risk of an adverse employee reaction should the true magnitude of the reductions ... some participants would experience was real," Pet.App. 113a, CIGNA sought to "[q]uickly dispel perceptions of 'take away'." JA 813a, 846a, 872a. CIGNA's strategy "proved successful", Pet.App. 114a, with internal emails and memos recognizing that "we have avoided any significant negative reaction from employees" and that the "introduction of the plan did not set off any significant rumblings at CIGNA, and things remain quiet." JA 838a, 894a. The district court found that CIGNA's "attempts to lull its employees into thinking" that the conversion "would not result in a significant reduction in the rate of benefit accrual" were successful. Pet.App. 201a.

The district court determined that "CIGNA's successful efforts to conceal the full effects of transition to Part B 'deprived [plaintiffs] of the opportunity to take timely action'" whether that action was "protesting at the time Part B was implemented, leaving CIGNA for another employer with a more favorable pension plan, or filing a lawsuit like this one. As Ms. Amara testified, had she been told during her rehire interview that she would not be earning additional retirement benefits during a wear away period, she could have 'negotiated for a higher salary,' 'looked and talked to other employers,' or stayed at her previous position." Pet.App. 137a.

CIGNA did not offer a single fact witness or any documentary evidence to show that any employees were aware of the effects of wear away or to counter the documentary evidence that CIGNA deliberately concealed the truth to avoid an employee backlash. Indeed, even after the trial, CIGNA declined the district court's invitation to identify anyone who might have known about the wear away effect. JA 303a-314a. The district court concluded that "CIGNA has not provided the Court with any evidence that even a single employee had actual knowledge from CIGNA of the undisclosed information regarding the transition to Part B." Pet.App. 166a.

In response to a suggestion from CIGNA that the "employees who received but did not read the misleading notices and disclosures should be considered not to have demonstrated likely harm," the district court observed that CIGNA "fails to comment on the likelihood that any employee could even recall, much less prove, ten years after the fact, which publications (or sections of publications) she had read at the time of the transition." Pet.App. 167a-169a. The district court concluded that CIGNA's request to conduct further discovery on "harmless error" was based on "unsupported speculation about what thousands of depositions might reveal" and would be "time-consuming and almost certainly fruitless." *Id.* at 167a. The district court concluded that "CIGNA is seeking impermissibly to shift its burden of proof onto the class." *Id.* at 169a.

On appeal, CIGNA admitted that its disclosures were "totally inadequate." JA 383a. CIGNA nevertheless contended that it had established "harmless error" at trial on a class-wide basis by showing that it distributed "personal benefit statements" which, according to CIGNA, disclosed "the exact amount of each participant's opening account balance." JA 339a. At oral argument, CIGNA conceded that the personal benefit statements did not disclose "what the impact of the change is going to be." JA 387a-388a. The Second Circuit rejected CIGNA's contentions and affirmed the district court's judgment in an unpublished opinion.[4]

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[4] The Second Circuit simultaneously affirmed the district court's decision *not* to award any relief for two other disclosure violations that the district court found at trial, even though the district court expressed "considerable uncertainty" about those rulings and asked for guidance. Respondents' petition for certiorari on those rulings is pending under No. 09-784.

SUMMARY OF ARGUMENT

Based on the bench trial, the district court here found material conflicts between the SMM and SPDs that CIGNA distributed to its employees and the more technical formal plan documents that CIGNA maintained. CIGNA's summary descriptions promised that "each dollar's worth of credit is a dollar's worth of retirement benefits payable to you" and "your benefit will grow steadily throughout your career" while the terms of the formal plan documents actually led to periods of "wear-away" for almost all participants in which no additional retirement benefits were earned. Pet.App. 127a. The statements in the summaries were inconsistent with the formal plan document, which provided for a "greater of A or B system" and "structur[ed] the opening account balances under Part B" in a manner which "practically ensured" wear-aways. *Id.* at 121a-122a. The district court found that CIGNA produced the misleading summaries to avoid the risk of an employee "backlash" likely to result from full disclosure of the "takeaways." *Id.* at 113a-114a. CIGNA produced no evidence to counter this, and did not show that "even a single employee" knew about the wear-aways from any information provided by CIGNA. *Id.* at 166a.

ERISA §102(a) requires that plan administrators distribute SPDs and SMMs to employees covered by benefit plans to "reasonably apprise" them of their "rights and obligations." Both types of summaries must be accurate and be "written in a manner calculated to be understood by the average plan participant." *Id.* ERISA does *not* require employees to be provided the more formal and technical plan documents that CIGNA describes as the "original, as it were," of the plan. Br. 14. ERISA §404(a)(1)(D) requires plan fiduciaries to adhere to the terms of the plan set forth in "the documents and instruments [plural] governing the plan insofar as such documents and instruments are consistent with the provisions of this title [title I of ERISA]." As this Court recognized in *Kennedy v. Plan Admin. for DuPont Sav. & Inv. Plan*, 129 S.Ct. 865, 877 (2009), SPDs are among the "documents and instruments" that govern the plan. Even before *Kennedy*, the courts of appeals—including the lone circuit (the Third Circuit) on which CIGNA relies—all held that SPDs and SMMs are among the "documents and instruments governing the plan" within the meaning of ERISA.

The courts of appeals have likewise unanimously held that that when a description of benefits in SPDs and SMMs conflicts with the more technical plan documents that participants generally do not see, the summary description must control. Undisclosed terms are also ineffective or unenforceable. These rules make sense because ERISA does not allow secret restrictions or benefit reductions. "To allow the Plan to contain different terms that supersede the terms of the [summary] would defeat the purpose of providing the employees with summaries." *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990). "Any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting and who are most able to bear that burden, and not on the individual employee." *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991).

As CIGNA recognizes (Br. 32), ERISA reflects a number of "legislative negotiations" and compromises. But the detrimental reliance requirement that CIGNA now seeks is *not* one of them. Instead, like most modern disclosure laws, ERISA uses an objective "average" plan participant to establish "a simple requirement that will not mire plan administrators and courts in fact-specific inquiries." *McDowell v. Krawchison*, 125 F.3d 954, 961 (6th Cir. 1997). Objective standards like this "avoid[] the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006).

The duty to disclose complete and accurate information in trust law also supports respondents' position that a fiduciary cannot mislead beneficiaries and then place the burden on each beneficiary to prove how things would have been different with disclosure. *See Res. (Sec.) of Trusts,* §173, cmt. d; Bogert, *Trusts* (6th ed.), §96. When a fiduciary breaches the duty to disclose, "harmless error" can be used as a defense, but trust law has never supported a rule that allows a fiduciary to mislead beneficiaries and then "prevail without coming forward with *any* evidence at all." Suppl. Pet. Br. at 9 (emph. orig.).

CIGNA's refrain that allowing recovery without a showing of detrimental reliance will lead to "virtual-strict liability" (Br. 23, 25, 35) does not hold up. It is not "strict liability" to hold an employer who negligently or intentionally misleads its employees about retirement benefits to the benefits that were promised—this merely assures that promises are kept and is one of the central reasons why ERISA was enacted. Moreover, the material conflict and likely prejudice/harmless error standards used in the Second, Third, Fifth and Sixth Circuits have clearly not resulted in "virtual-strict-liability" in those circuits.

The heart of CIGNA's argument is that the promises it made in the SMM and SPDs should not be enforceable because the summary descriptions are "no more a 'plan' than a syllabus to one of this Court's opinions is itself an opinion." Br. 15. In view of the statutory obligations and the "plan documents rule" in *Kennedy*, this contention is flatly wrong—as is CIGNA's related argument that its representations to its employees about their benefits were "gratuitous." Br. 12, 21, 32.

CIGNA's argument that a subjective detrimental reliance requirement should nonetheless be implied because ERISA §102 is in some respect like a common-law tort action for misrepresentation also fails. Neither the disclosure rules in ERISA §102 nor the causes of action in ERISA §502(a) contain any language compatible with the detrimental reliance requirement that CIGNA seeks. Without a textual basis, detrimental reliance cannot be imposed. As this Court stated in *Bridge v. Phoenix Bond & Indemnity*, 553 U.S. 639, 648 (2008):

> If petitioners' proposed requirement of first-party reliance seems to come out of nowhere, there is a reason. Nothing on the face of the relevant statutory provisions imposes such a requirement.

For similar reasons, CIGNA's policy arguments in support of implying a detrimental reliance requirement lack merit. Congress enacted ERISA's disclosure requirements to prevent what happened here – distributing summary descriptions that assure employees that their pension benefits are being enhanced when the "cold legal phrasing" in a formal plan document says otherwise. Congress did not want the courts to have to strike Faustian bargains between deceptive booklets and the maintenance or formation of plans. Finally, CIGNA's detrimental reliance proposal would not produce any "uniformity" in plan terms, but inefficient, expensive and protracted litigation in which the terms of plans would ultimately depend on subjective judicial assessments of credibility. This is exactly the kind of inconsistent, weak, and ineffective enforcement that Congress rejected in enacting ERISA.

ARGUMENT

I. PLAN PARTICIPANTS ARE ENTITLED TO THE BENEFITS CIGNA PROMISED IN THE PLAN SUMMARIES.

After nearly a decade of study, Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA") as a comprehensive response "to the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives." S. Rep. 93-127 at 1, 1974 U.S.C.C.A.N. 4838. "Employers are not required to provide pension benefits, but when they do, their plans must comply with ERISA, and the promises they make can in no way be considered mere gratuities." *Williams v. Rohm & Haas Pension*

Plan, 497 F.3d 710, 714 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 1657 (2008). To address the "inequities that are visited upon plan participants" before ERISA, Congress established standards, including for "adequate communication to participants," to "which all private pension plans must conform if the private pension promise is to become real rather than illusory." H.Rep. 93-533 at 5, 10, 1974 U.S.C.C.A.N. 4639, 4643 & 4648.

A. CIGNA May Not Revisit the Unappealed Findings that It Materially Misled Its Employees About Benefit Reductions to Avoid an Employee "Backlash."

This case is unusual in the over 60 ERISA cases to have reached this Court in that there was a trial below (*Varity Corp. v. Howe* appears to be the only other such case). CIGNA did not appeal any of the district court's findings of fact, so it is settled that they may not be challenged. *See, e.g., L. P. Steuart & Bro., Inc. v. Bowles*, 322 U.S. 398, 406 (1944)).

CIGNA's brief is, however, riddled with assertions that continue to battle with the facts established by the district court. It is already established that CIGNA's disclosures to its employees about the periods of wear-away and reductions in future benefits were "downright misleading." Pet.App. 8a. And it is settled that CIGNA did this to avoid a "backlash" from employees about the reductions in their future retirement benefits. *Id.* at 114a. But CIGNA's brief nonetheless seeks to downgrade its "downright misleading" statements to the status of "stray comments" and "minor discrepancies," and it continues to describe CIGNA's summary descriptions as only "alleged[ly]" or "purportedly" inconsistent with the formal plan documents. Br. 6, 8, 35-36.

Most seriously, CIGNA's brief does not mention the employee "backlash" that it sought to avoid but suggests that only "gratuitous promises" are involved. Br. 12, 21 n.4, 32. As CIGNA knows, retirement benefits are far too important of a part of employees' pay to suggest that representations that are statutorily-required to be accurate were "gratuitous."[5] In enacting the Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA"), Congress recognized that "the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation." S. Rep. 85-1440, 3, 1958 U.S.C.C.A.N. 4137, 4139. The Committee reports and legislative history of ERISA are also replete with descriptions of pensions as "deferred wages." *See, e.g.*, S. Rep. 93-127, 3, 1974 U.S.C.C.A.N. at 4839. Senator Javits, the chief sponsor and architect of the legislation, explained how employees exchange their work for a pension:

> [T]he private pension plan is a means for transferring earnings during the working years into income for a decent living in the older years. The worker 'works' for that pension the same way he 'works' for his wages or salary and when he does not get it or some reasonable portion of it, he is angry, frustrated, and ultimately convinced that he

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[5] *See, e.g., Daniel v. Int'l Broth. of Teamsters*, 561 F.2d 1223, 1244 (7th Cir. 1977), *rev'd on other grounds*, 439 U.S. 551 (1981) (citing statistics that retirement benefits are "second only to wages" as source of labor-management disagreements).

> has been robbed of a material recognition that was due him.

II ERISA Leg. Hist. (Committee Print) 1609. In both *Lockheed Corp. v. Spink*, 517 U.S. 882, 893-94 (1999), and *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 445 (1999), this Court recognized that "[a]mong the ... legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees [and] paying deferred compensation."

Similarly, CIGNA's brief asserts that "thousands of plaintiffs…in all likelihood never read CIGNA's SPDs." Br. 25. But CIGNA introduced no such evidence below. In fact, a contemporaneous survey *taken by CIGNA*, which plaintiffs introduced, shows that a remarkable 92% of respondents "thoroughly" read the summaries. JA 895a. At trial, the named class representatives and other employees testified about reading the SMM or SPDs.[6]

CIGNA's brief also contains numerous references to a threat to the Plan's "actuarial soundness", "crippling class-wide liability," and "massive, unforeseen pension liabilities." Br. 35, 36, 38. But in defending its position that a $45 million bond was sufficient while this case was on appeal, CIGNA told the district court that "no evidence exists that CIGNA, a company with $1.115 billion in net income in 2007 would be unable to pay any additional

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[6] JA 149a-150a, 168a, 182a-183a, 203a-204a, 213a, 222a, 229a-230a.

required contributions to the Plan" resulting from the Court's Order. Record 295 at 3. [7]

Despite CIGNA's efforts to revisit the facts, the issue here is clearly *not* whether employees are entitled to obtain benefits on account of "gratuitous" promises or "stray comments" in summary descriptions. Instead, the issue is whether CIGNA can deliberately withhold information about circumstances that result in losses tantamount to significant pay cuts, make "downright misleading" representations denying the losses and still enforce the undisclosed technical document wording that was hidden from employees.

B. Under ERISA, SPDs Are Among the "Plan Documents" Governing the Plan.

ERISA's disclosure rules are designed to require employers to "arm plan participants with specific knowledge of their rights and remedies with respect to employee benefit plan" in order to protect themselves. *Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 143 (2d Cir. 1997). Congress felt that ERISA's predecessor legislation was "weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards." H. Rep. 93-533 at 4, 1974 U.S.C.C.A.N. 4639, 4642; S. Rep. 93-127 at 4, 1974 U.S.C.C.A.N. 4838, 4841. Prior to ERISA's enactment, the WPPDA had required plan descriptions and annual financial reports to be

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[7] In 2008, CIGNA recorded an $80 million charge to account for its "best estimate of the liabilities related to the court order." Online at: http://www.cigna.com/about_us/investor_relations/sec_filings/4Q2009/cigna10k20091231.pdf, at 166.

available for examination or provided on written request. P.L. 85-836, as amended by P.L. 87-420 (1962). But the WPPDA did not regulate the form or contents of employee booklets, such as requiring a comprehensive description of benefit rights or circumstances that can cause benefits to be lost. Senator Javits, ERISA's chief Senate sponsor, observed: "Many workers are led to believe they are covered by a good pension plan because of nicely phrased booklets and other assurances handed them by their employers. When the time comes for the payoff, they learn that the cold legal phrasing in pension contracts says otherwise." III ERISA Leg. Hist. 4750.

The reports of the House Education & Labor and the Senate Labor & Public Welfare Committees concluded identically:

> It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if the conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan's provisions, often cannot comprehend them because of the technicalities and complexities of the language used.

H. Rep. 93-533 at 8, 1974 U.S.C.C.A.N. at 4646; S. Rep. 93-127 at 11, 1974 U.S.C.C.A.N. at 4847. The reports also found that when employees sought legal redress, "Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording." H. Rep. 93-533 at 5, 1974 U.S.C.C.A.N. at 4643; S. Rep. 93-127 at 5, 1974 U.S.C.C.A.N. at 4842.

To address these problems, ERISA enacted minimum standards, including on "adequate communication to participants," "to which all private pension plans must conform if the private pension promise is to become real rather than illusory." H. Rep. 93-533, at 10, 1974 U.S.C.C.A.N. at 4648. Section 102 of ERISA sets forth the disclosure rules Congress enacted so employee booklets would no longer lead employees to believe they would receive generous pension benefits when formal plan documents contradict that promise. Section 102 provides that an SPD must be distributed to each participant that accurately discloses benefit rights and obligations under the plan, including circumstances that cause losses of benefits, and is "written in a manner calculated to be understood by the average plan participant." 29 U.S.C. §1022 (a) and (b). Section 102(a) also provides that an SMM must be distributed if there is a material change to the benefit provisions or the circumstances that cause losses. 29 U.S.C. §1022(a).

The regulations issued by the Labor Department to govern SPDs provide that their format "must not have the effect [of] misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant." 29 C.F.R. 2520.102-2(b). "[C]ircumstances which may result" in the loss or reduction of benefits that an average plan participant "might otherwise reasonably expect the plan to provide" must be "clearly" identified, 29 C.F.R. 2520.102-3(l), and any change in those circumstances must be disclosed. 29 C.F.R. 2520.104b-3(a).[8]

ERISA requires the SPDs and SMMs to be distributed to every participant. ERISA §104(b)(1), 29 U.S.C. §1024(b)(1). Other documents or instruments governing the plan are available only on request. ERISA §104(b)(4). As a result, SPDs and SMMs are the "primary" means by which benefit rights and obligations are communicated. *Burstein v. Ret. Account Plan for Allegheny Health Educ. & Res. Fdn*, 334 F.3d 365, 379 (3d Cir. 2003) ("as Congress intended, the SPD is the primary document on which plan participants must rely"); *Layaou v. Xerox Corp.*, 238 F.3d 205, 211 (2d Cir. 2001) ("employees are entitled to rely on the SPDs as their primary source of information about their benefits"); *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992) (the SPD is "the statutorily established means of informing participants of the terms of the plan and its benefits"); *Bergt v. Ret. Plan for Pilots Employed by Mark Air, Inc.*, 293 F.3d 1139, 1143 (9th Cir. 2002) ("SPD is the 'statutorily established means of informing participants of the terms of the plan and

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[8] The preamble to the regulations states that "the SPD must not be slanted in a way that … plays down the plan terms which may cause a participant to lose benefits….There must also be a description of any terms of a plan which could result in a participant losing benefits…. Lawsuits may be brought to remedy violations of the disclosure, fiduciary or antidiscrimination provisions of ERISA, and to obtain benefits that have been denied improperly." 42 Fed. Reg. 14266-14267 (3/15/77).

its benefits' and the employee's primary source of information regarding employment benefits").

As indicated, ERISA does *not* require employers to distribute the "lengthy and highly technical" documents containing all the details of the plan to participants. *Jenson v. Sipco, Inc.*, 38 F.3d 945, (8th Cir. 1994). The formal plan documents "are generally voluminous documents written in technical legal terms," CIGNA Br. 3, and are "not provided to employees as a matter of course, but must be either inspected on ... designated premises or requested in writing." *Burstein*, 334 F.3d at 379; 29 U.S.C. § 1024(b)(4) (plan documents other than SPDs and SMMs are only available "on request"). As a result, most employees and even senior executives never see the formal document. *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 621 (8th Cir. 1998) (calling the formal document "a transactional document only lawyers will read").

Under what has come to be known as the "plan documents rule," *Kennedy v. DuPont,* 129 S.Ct. at 877, an SPD is one of "the documents or instruments governing the plan." Plan fiduciaries must discharge their duties in accordance with those documents and instruments "insofar as ... consistent with the provisions" of title I of ERISA, which includes the rules applicable to summary descriptions. ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D).

As this Court observed in *Kennedy*, the "plan documents rule" provides "a straightforward rule that lets employers establish a uniform administrative scheme, with a set of standard procedures to guide processing of claims and disbursement of benefits." 129 S.Ct. at 875. Even before *Kennedy*, the courts of appeals had consistently held that summary descriptions are part of the plan documents. *See*, *e.g.*, *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1999) ("SPDs are considered part of the ERISA plan documents").[9] State courts have similarly concluded that certificates of coverage that are statutorily "required to contain the contract essentials" should be considered part of the contract of insurance. Appleman, *Insurance Law & Practice* (1981), §46 at 156; *accord*, *Couch on Insurance 3d*, §8:21 & 8:23.

CIGNA argues that the "structure" of ERISA precludes the conclusion that SPDs are among the documents that set forth the plan. CIGNA maintains that because 29 U.S.C. §§1024(b)(2) and 1029(c) *separately* identify SPDs before referring to the "other instruments under which the plan was established or is operated," SPDs are not among those "instruments." Br. 15. This argument ignores the teachings of *Kennedy* and the courts of appeals that summary descriptions are part of the plan documents and obviously misreads the cited provisions, which are reasonably construed to include SPDs among the "instruments under which the plan … is operated."

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[9] *See also Jensen v. SIPCO*, 38 F.3d 945, 949 (8th Cir. 1994); *Hughes v. 3M Retiree Med. Plan*, 281 F.3d 786, 790 (8th Cir. 2002) (SPDs "form part of the written documents required by ERISA"); *Ross v. Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 739 (8th Cir.), *cert. denied*, 537 U.S. 885 (2002) (the insurance "policy and the Summary Plan Description jointly constitute the Plan documents"); *Alday v. Container Corp. of Am.*, 906 F.2d 660, 665-666 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

C. In Cases of Conflict Between an SPD and Underlying Plan Language, ERISA Requires the SPD to Control.

When "there is no conflicting language" between SPDs (and SMMs) and more detailed plan documents, the courts "read the SPD and [other] Plan documents together as [an] integrated whole." *Morrison v. Marsh & McLennan Cos.*, 439 F.3d 295, 301-02 (6th Cir. 2006); *accord Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1023 (7th Cir. 1998), *cert. denied*, 525 U.S. 947 (1998); *Jensen v. SIPCO*, 38 F.3d at 952-53; *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 939-940 (5th Cir. 1993).

Obviously, the question of what happens when an SPD and other underlying plan documents *cannot* be reconciled has also arisen. As indicated, every circuit other than the D.C. Circuit, which has not ruled, has held that when the description of benefits in SPDs and SMMs conflicts with more detailed plan documents that participants generally do not see, the summary descriptions control.[10] The Second Circuit's *Burke* decision explains that giving SPDs precedence

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[10] *See Bard v. Boston Shipping Ass'n*, 471 F.3d 229, 245 (1st Cir. 2006); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990); *Burstein*, 334 F.3d at 378 and 381 (3d Cir. 2003); *Blackshear v. Reliance Std. Life Ins. Co.*, 509 F.3d 634, 644 (4th Cir. 2007); *Washington v. Murphy Oil USA, Inc.*, 497 F.3d at 457 (5th Cir. 2007); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 249 (6th Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997); *Spitz v. Tepfer*, 171 F.3d 443, 448 (7th Cir. 1999); *Halbach v. Great-West Life and Annuity Ins. Co.*, 561 F.3d 872, 877 (8th Cir. 2009); *Bergt*, 293 F.3d at 1143-45 (9th Cir. 2002); *Chiles*, 95 F.3d at 1515 (10th Cir. 1999); *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985).

"makes sense when it is recalled that the SPD 'will be an employee's primary source of information regarding employment benefits.'" 336 F.3d at 110 (quoting *Heidgerd*, 906 F.2d at 907-08). "The consequences of an inaccurate SPD must be placed on the employer. The individual employee is powerless to affect the drafting and less equipped to absorb the financial hardship of the employer's errors." 336 F.3d at 113. As the Second Circuit earlier explained in *Heidgerd*, "[t]o allow the Plan to contain different terms that supersede the terms of the [summary] would defeat the purpose of providing the employees with summaries." 906 F.2d at 907-08.

In *Hansen v. Continental Ins. Co.*, 940 F.2d at 981-82, the Fifth Circuit agreed that "[a]ny other rule would be, as the Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary." Indeed, if statements in a plan summary were not binding, "the summary would not need to be accurate or comprehensive–if there were an ambiguity in the summary or an inaccuracy that put the summary in conflict with the policy, that ambiguity or inaccuracy would be cured by the policy itself." *Id.*; *see also* *Washington v. Murphy Oil*, 497 F.3d 453, 457 (5th Cir. 2007) (quoting *Hansen*); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988) ("Congress has promulgated clear directives prohibiting misleading summary descriptions. This court elects not to undermine the legislative command"). The Third Circuit's *Burstein* decision carefully reviews all of these cases, except *Washington* which was decided later, and concludes that allowing the "summary plan description [to] ...

control" is "faithful" to "Congress's desire that the SPD be transparent, accurate, and comprehensive." 334 F.3d at 378.

CIGNA nonetheless asserts that *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 79 (1995), stands for the proposition that "an SPD may not amend a plan unless the plan's amendment procedures so permit." Br. 11. But statements and omissions in SPDs are not "amendments" to the plan; instead, SPDs are among the documents that *govern* the plan because of the disclosure requirements in ERISA §102 and the fiduciary duties in ERISA §404(a)(1)(D). Indeed, *Curtiss-Wright* recognizes that ERISA's amendment procedure provision is "not part" of the "disclosure requirements", which serve distinct purposes. 514 U.S. at 83-84. None of the eleven circuits that has held employers to the promises made in their SPDs has viewed *Curtiss-Wright* as an impediment to protecting employees from the consequences of inadequate disclosures in SPDs. Instead, *Curtiss-Wright* addresses the separate requirements for determining whether an "unfavorable" amendment has been validly adopted.[11]

[11] In *Curtiss-Wright*, the director of benefits and labor counsel sought to make the terms of the plan "unfavorable" by issuing an SPD that provided for "termination of health care benefits" in specific circumstances. 514 U.S. at 75-76 and 84. This Court remanded for a "fact-intensive" determination of whether the unfavorable terms were adopted in conformity with the "amendment procedure provision" in ERISA §402(b)(3). *Id.* at 82, 85.

D. The Determination of Whether an SPD Conflicts with the Terms of a Formal Plan Document Is an Objective One.

When an inconsistency is alleged between a formal plan document and a summary description that ERISA regulates, the district court must evaluate the statements and omissions in the summary description in light of the understanding and expectations of an "average plan participant." This is an objective standard. *See Wilson v. Southwestern Bell Tel.*, 55 F.3d 399, 407 (8th Cir. 1995) (whether SPD is calculated to be understood by the "average plan participant" "appears to be an objective standard"); *accord Arnold v. Arrow Transp. Co.*, 926 F.2d 782, 785 (9th Cir. 1991) (whether the SPD's descriptions "satisfy ERISA is a legal question"). An average or "reasonable" person standard "look[s] to set some objective or universal (as opposed to 'subjective,' or individualized) standard of conduct." Lisa J. Bernt, "Finding the Right Jobs for the Reasonable Person in Employment Law," 77 *UMKC L. Rev.* 1 (Fall 2008).

To enforce this standard, a district judge must determine what a reasonable plan participant would understand to have been promised. That question does not depend on the subjective understandings of particular participants. Accordingly, an employer cannot withstand relief by demanding that each participant testify as to his or her subjective understandings and, conversely, a participant cannot obtain relief based on his or her "confusion" or individual understanding. *See, e.g.*, *Fuller v. FMC Corp.*, 4 F.3d 255, 261 (4th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).

The "average" participant standard is also used in:

- ERISA §204(h)(2), as amended by EGTRRA, and Treas. Reg. 54.4980F-1, Q&A-11;
- The COBRA regulations at 29 CFR 2590.606-1(c)[12]; and
- The Older Worker Benefit Protection Act ("OWBPA") at 29 U.S.C. 626(f)(1) and 29 CFR 1625.22(b).

Each of these has been interpreted to establish an objective standard and none has been construed to depend on subjective proof. In *McDowell v. Krawchison*, 125 F.3d at 961, the Sixth Circuit ruled that the "clear language of the [COBRA] statute ... establishes a simple requirement that will not mire plan administrators and courts in fact-specific inquiries."[13] The OWBPA standard has been applied in *Syverson v. IBM*, 472 F.3d 1072, 1083-86 (9th Cir. 2007), and *Thomforde v. IBM*, 406 F.3d 500, 503-505 (8th Cir. 2005), without hearings into individual understandings or reliance. Instead, the courts look at whether the language of a release is "confusing," *Syverson*, 472 F.3d at 1096, or lacks "clarity," *Thomforde*, 406 F.3d at 505, and invalidate the

[12] ERISA §204(h) and COBRA are enforced through the same ERISA §502(a) causes of action applicable to this case.

[13] *Accord Smith v. Rogers Galvanizing Co.*, 128 F.3d 1380, 1383-85 (10th Cir. 1997) (affirming award of retroactive insurance coverage under COBRA when a "notice was inadequate").

release if it does not meet the statutory standard.[14] Objective, reasonable person standards are also used under other communication-related statutes, again without requiring subjective, individual testimony to establish liability.[15]

Here, the district court's "well-reasoned and scholarly" opinion (Pet.App. 4a) correctly concludes that CIGNA's December 1997 SMM and its two SPDs from October 1998 and September 1999 constituted "affirmatively and materially misleading" summaries of the new plan document. Pet.App. 114a. The district court found that although "CIGNA was aware that its Plan could result in wear away," Pet.App. 29a, the SPD misled participants in its ERISA §204(h) notice, SMM, and SPD by describing the cash balance plan as an "enhancement" with no "cost savings" for CIGNA and no disclosures about periods where benefits would not be growing. Pet.App. 31a, 34a. CIGNA told

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[14] See also *Jensen v. Solvay Chemicals Inc.*, __ F.3d __, 2010 WL 3472945 (10th Cir. 9/7/10) (applying average plan participant standard in ERISA §204(h) based on the court's determinations about the understandability of the disclosures).

[15] *See, e.g., Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 and 1093 (9th Cir. 2010) ("objective reasonable person" standard for liability under Hawaii's consumer protection act negates individual reliance issues); *Rendler v. Corus Bank, N.A.*, 272 F.3d 992, 999 (7th Cir. 2001) (adequacy of Truth in Lending Act disclosures "can only be judged by an objective reasonable person standard"); *Savino v. Computer Credit*, 164 F.3d 81, 85 (2d Cir. 1998) ("objective standard…measured by the least sophisticated consumer" under Fair Debt Collection Practices Act); *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974) ("reasonable person" standard under OSHA "is an external and objective test").

employees that "you will see the growth in your total retirement benefits from CIGNA every year" and that "each dollar's worth of credits is a dollar of retirement benefits payable to you" even though there were periods of "wear-away" where participants were not earning additional benefits." *Id.* at 37a, 40a. These statements were inconsistent with the formal plan document, which provided for a "greater of A or B system" and "structur[ed] the opening account balances under Part B" "which practically ensured that wear away would occur." *Id.* at 121a-122a.

E. Participants Are Entitled to Relief If There Is a Material Conflict; If a Showing of Prejudice Is Required, It Should Be Possible Prejudice to an Average Plan Participant.

Because the text of ERISA and the DOL regulations establishes an objective standard and imposes no subjective reliance requirement, there is no statutory basis to impose one. The appropriate test is whether the conflict is "material." *Burstein*, 334 F.3d at 379 & 380 (conflict between SPD and Plan Documents was "not only stark" but "unquestionably material"); *Washington v. Murphy Oil*, 497 F.3d at 459. Even if a showing of possible prejudice could be implied from the statute when there is no material conflict, the proper standard is possible prejudice to an "average plan participant," not actual prejudice to each individual in the plan.

CIGNA misleadingly asserts that "the majority of courts of appeals to consider the question have rejected the 'likely harm' approach and instead required a showing of detrimental reliance." Br. 25.

As shown by CIGNA's own quote from *Govoni v. Bricklayers, Masons & Plasterers Union*, 732 F.2d 250, 252 (1st Cir. 1984), those circuits actually require "some significant reliance upon, *or possible prejudice flowing from*, the faulty plan description." Br. 26 (quoting *Govoni*).

Contrary to CIGNA's representations, there is no discernable difference on their face between the "possible prejudice" standard in *Govoni* and the "likely harm" or "material conflict" standard. As stated in *Burke*, the problem with the reliance-or-possible-prejudice standard has been that: (1) "possible prejudice" has been applied with "varying degrees of stringency," and (2) detrimental reliance "imposes an insurmountable hardship on many plaintiffs." 336 F.3d 113. [16]

The circuits that have adopted a material conflict or likely prejudice standard have explained the statutory basis for their position. In *Burke*, the decision that CIGNA principally challenges, the Second Circuit held that:

> The [ERISA] statute and the DOL regulations place the burden on employers to draft an SPD that is accurate, comprehensible, and clear regarding restrictions on eligibility for benefits.... The consequences of an inaccurate SPD must be placed on the employer....

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[16] The Eleventh Circuit appears to have transformed the *Govoni* standard into a test for detrimental reliance alone in two decisions: *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340-46 (11th Cir. 2006); *Branch*, 955 F.2d at 1579. However, an unpublished ruling indicates that "what type of reliance is required" is not settled. *Kamlet v. Hartford Life and Acc. Life Ins. Co.*, 144 Fed.Appx. 755, 757 (11th Cir. 2005).

336 F.3d at 112-113. *Burke* rejected detrimental reliance because it imposes an "insurmountable burden on many [participants]" that "hardly advances the Congressional purpose of protecting the beneficiaries of ERISA plans by insuring that employees are fully and accurately apprised of their rights." *Id.*

In *Burstein*, the Third Circuit determined that ERISA §102 "expresses Congress' desire that the SPD be transparent, accurate, and comprehensive." 334 F.3d at 378. *Burstein* concluded that "[b]ased upon our view of Congress's intent, an SPD furnishes the plan's terms to the extent that it conflicts with (and thus supersedes) the language of a formal plan document." *Id.* at 381-82. "[J]ust as a court's enforcement of a contract generally does not require proof that the parties to the contract actually read, and therefore relied upon, the particular terms of the contract, we are persuaded that enforcement of an SPD's terms under a claim for plan benefits *does not* require a showing of reliance." *Id.* at 381 (emph. orig.); see also *Edwards*, 851 F.2d at 137 ("Congress has promulgated clear directives prohibiting misleading summary descriptions. This court elects not to undermine the legislative command"); *Washington*, 497 F.3d at 457 ("if there is a conflict between the summary plan description and the terms of the policy, the summary plan description shall govern. Any other rule would be, as the Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary").

The circuits that have adopted the reliance-or-possible-prejudice standard have, by contrast, not identified the statutory or regulatory basis for those requirements and have not addressed how those requirements can be implied if they are not based on statutory text. See, e.g., *Branch*, 955 F.2d at 1578-80. CIGNA's brief is the same. It never points to any statutory language as the basis for requiring an individualized showing of detrimental reliance. See Br. 24-26.

Respondents respectfully submit that in the event of a conflict between an SPD and other documents and instruments, a district court's determination does not need to go beyond finding a material conflict that would violate ERISA §102 if the undisclosed terms were enforced. As applied by the court below, the Second Circuit's "likely harm" rule is very similar to finding materiality, generally defined as information "of such a nature that knowledge of [it] would affect a person's decision making process." *Black's Law Dictionary* (7th ed.). However, as *Burke* recognizes and the case law demonstrates, a possible prejudice standard is "amorphous" enough that a different court could apply it in a manner that is similar to requiring "detrimental reliance." *Burke*, 336 F.3d at 113 (prejudice standard has been applied "with varying degrees of stringency"). Many of the cases under the "possible prejudice" standard reach results that are only compatible with detrimental reliance.[17] In most of these instances, this results

[17] *See, e.g.*, *Greeley v. Fairview Health Servs.*, 479 F.3d 612, 615 (8th Cir. 2007) (disability benefits were available until age 67 under the SPD but only until age 65 under plan document; the court found no reliance or prejudice because Greeley "had no choice but to go on disability because of the condition of his lungs" and "offered no evidence" other than "financial loss"

from looking at possible prejudice only to the individual (effectively requiring "actual prejudice"), rather than look at possible prejudice to the average participants to whom the disclosures were directed. As the district court observed here, applying the "possible prejudice" or "likely harm" rule to require each individual plaintiff to show what he would have done differently if the notices were accurate would "essentially re-impose the detrimental reliance standard." Pet.App. 135a.[18]

F. Respondents Properly Sued Under ERISA's Section 502(a)(1)(B) "to Recover Benefits Due … Under the Terms of [the] Plan."

CIGNA devotes practically half of its argument to claiming that because respondents rely on representations that CIGNA made in summary descriptions, respondents' claims are not "under the terms of [their] plan" and are not cognizable under Section 502(a)(1)(B) but only under Section 502(a)(3). Br. 13-23. CIGNA did *not* petition for certiorari on this ground and it took a different position below, conceding that plaintiffs should be able to obtain

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"that he changed course of action or otherwise relied on the faulty SPD").

[18] Respondents submit that if an analysis of likely or possible prejudice has a place in actions over inadequate SPDs, it should be in cases in which there is not a material conflict, but the SPD violates ERISA §102 by failing to be written in a manner calculated to be understood by the average plan participant.

"their benefits without the undisclosed provision" on "wear-away" under ERISA §502(a)(1)(B).[19]

Congress sought to provide "appropriate remedies, sanctions, and ready access to the Federal courts" under ERISA, 29 U.S.C. §1001(b), including through ERISA §502(a)(1)(B). That Section provides that a "civil action may be brought" by a "participant or beneficiary" to "recover benefits due to him under the terms of his plan." As this Court recognized in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147-48 (1985), an ERISA §502(a)(1)(B) action is a contract enforcement action. In *Russell*, this Court denied "extra-contractual" damages recognizing the "repeatedly emphasized purpose [of ERISA] to protect contractually defined benefits" and describing a claim for benefits as an action to recover "contractually authorized benefits."

Here, the plaintiffs properly invoked both the contractual cause of action in ERISA §502(a)(1)(B) and the "catch-all" cause of action in ERISA §502(a)(3), *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996), seeking relief under the latter only if it was unavailable under §502(a)(1)(B). Pet.App. 171a-172a. The district court found that because

[19] This issue was not in the Question Presented. See Sup. Ct. R. 24.1(a) ("brief may not raise additional questions or change the substance of the questions already presented"). Below, CIGNA argued that Plaintiffs could have obtained "their benefits without the undisclosed provision" on "wear-away" under ERISA §502(a)(1)(B) if they had sued both the Plan and the Plan Administrator (an individual employee named Stewart Beltz). Record 276 at 12-14 ("[t]o the extent Plaintiffs now seek under Section 502(a)(3) a recalculation of their benefits without wearaway, the same relief would have been available had they sued the Plan Administrator under Section 502(a)(1)(B)").

"Plaintiffs may recover benefits from the CIGNA Plan (as opposed to CIGNA itself) under § 502(a)(1)(B)", it "did not need to consider" whether relief "would also be available under §502(a)(3)." Pet.App. 179a, 182a.

CIGNA's argument that the district court was not authorized to award plaintiffs their benefits under §502(a)(1)(B) without the undisclosed provision on wear-away is, as stated above, a new position that is based on a mistaken view that SPDs are *not* "documents or instruments governing the plan." As discussed above, *Kennedy v. DuPont* and all of the circuits that have ruled on this issue have held that SPDs are among the "documents and instruments governing the plan." Under the "plan documents rule," fiduciaries must act in accordance with the SPD both because it is part of the documents or instruments governing the plan and to act "consistent[ly] with the provisions" of title I. Under ERISA §§404(a)(1)(D) and 502(a)(1)(B), participants are entitled to obtain their benefits under the terms of the plan without the undisclosed provision on wear-away.

CIGNA's argument that Section 502(a)(1)(B) excludes any consideration of the summary descriptions rests primarily on *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir. 1991) (Alito, J.). *Gridley* stated that an "SPD is not a 'plan' within the meaning of Section 502(a)(1)(B)." 924 F.2d at 1316. However, *Gridley* devoted only one paragraph to this issue because the court had found—in a thorough analysis, *id.* at 1315-18—that the "overview brochure" on which the plaintiff claimed benefits was not an SPD. In *Burstein*, the Third

Circuit pointed out that the language upon which CIGNA now relies is "dictum," and "join[ed] with the other Courts of Appeals that have considered this issue" to "hold that, where a summary plan description conflicts with the plan language, it is the summary plan description that will control." 334 F.3d at 377-78. The Third Circuit emphasized that "[t]he SPD is the document to which the lay employee is likely to refer in obtaining information about the plan," and that more "official" plan documents are not supplied to employees and are often inaccessible. *Id.* at 379.

CIGNA's new argument on ERISA §502(a)(1)(B) is also at odds with circuit precedents recognizing that "the terms of the plan" do not include unenforceable or legally ineffective terms. Not everything an employer, or its counsel, writes in a legalistic plan document is an enforceable term. In *Page v. PBGC*, 968 F.2d 1310, 1315-16 (D.C. Cir. 1992), then-Judge Ginsburg rejected the Pension Benefit Guaranty Corporation's assertion that Congress "must have meant to guarantee only benefits vested according to the express provisions of a plan, not those attributable to the provisions of ERISA" when it referred to "the terms of the plan" in ERISA §4022(a). *Page* recognized that ERISA §502(a)(3) refers to both "the terms of the plan" and "any provisions of this title" and held this "allows plan participants to enforce against employers *both* their obligations under Title I and any more generous terms in a particular plan." 968 F.2d at 1315 (emph. orig.).

More recently, in *West v. AK Steel Ret. Accum. Plan*, 484 F.3d 395, 405 (6th Cir. 2007), *cert. denied*, 129 S.Ct. 895 (2009), the Sixth Circuit held that "Although AK Steel has a point that 502(a)(1)(B) offers redress only for the recovery of benefits ... under the terms of the Plan, those terms must nevertheless comply with ERISA."[20] *See also May Dept. Stores v. Fed. Ins. Co.*, 305 F.3d 597, 601-2 (7th Cir. 2002) (Posner, J.) ("like many other contracts, pension plans governed by ERISA contain provisions implied by law"); *Frommert v. Conkright*, 433 F.3d 254, 270 (2d Cir. 2006) ("recalculation" of benefits "falls comfortably within the scope of §502(a)(1)(B)"). *Accord Central Laborers v. Heinz*, 541 U.S. 739, 750 (2004) (ERISA's nonforfeitability rule "adds a mandatory term to all retirement packages that a company may offer"); *Unum Life Ins. v. Ward*, 526 U.S. 358, 374 (1999) (state notice-prejudice law "effectively creates a mandatory contract term").

Against this backdrop, CIGNA's effort to analogize an SPD to the syllabus of one of this Court's decisions rings especially hollow. This Court does not distribute syllabi to every member of the public while retaining the full opinions for production only on written request. Nor are there legal requirements that syllabi be comprehensive or accurate, or even published at all.

By contrast, in enacting ERISA Congress found that employee booklets were often inaccurate and misleading and that the more formal plan documents

[20] The Solicitor General's invitation brief on AK Steel's petition recommended denial on the ground that "ERISA specifies that plan terms are operative only to the extent that they are consistent with the statutory provisions, 29 U.S.C. 1104(a)(1)(D), and the requirements of ERISA are therefore incorporated into ERISA plans." Br. in No. 07-663 at 13-14.

were incomprehensible to participants "because of the technicalities and complexities of the language used." H. Rep. 93-533, at 11, 1974 U.S.C.C.A.N. at 4646; S. Rep. 93-127 at 8, 1974 U.S.C.C.A.N. at 4847. To cure this, Congress mandated the distribution of SPDs understandable to the average plan participant. For the law to achieve its purposes, the statements in an SPD must control when there is a material conflict with an underlying plan document. *Burstein*, 334 F.3d at 379 & 380; *Washington*, 497 F.3d at 459. Here, the plaintiffs should be able to obtain their benefits without the undisclosed provision on "wear-away" under ERISA §502(a)(1)(B).

G. ERISA's Duty to Disclose Is Consistent with Contract and Trust Law.

Trust law and contract law are consistent with the effect that ERISA's duty to disclose has on the terms of the plan that may be enforced under Section 502(a)(1)(B) and the "plan documents rule." Under contract law, laws that exist at the time a contract is made "enter into and form a part of [the contract], as fully as if they had been expressly referred to or incorporated in its terms." *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) (quoting *Farmers & Merchs. Bank of Monroe v. Fed. Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923)); *accord*, *2 Tudor City Place Assoc. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247, 1254 (2d Cir. 1991). Under trust law, "a trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal." *Res. (Sec.) of Trusts* §166; *id.* at §62 ("A trust or a provision in the terms of the trust is invalid if the enforcement of the trust or provision would be against public policy").

Despite CIGNA's assertion that trust law "adds little here," Br. 27, the duty to disclose in trust law clearly counsels *against* the implication of a detrimental reliance requirement when there is a breach of a duty to disclose. As Judge Friendly has observed, "Courts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." *In re Beck Ind., Inc.*, 605 F.2d 624, 636 (2d Cir. 1979). Section 173, cmt. d, of the *Restatement (Second) of Trusts* states that:

> In dealing with the beneficiary on the trustee's own account, [the trustee] is under a duty to communicate to the beneficiary all material facts in connection with the transaction which the trustee knows or should know.... Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest.

See also Res. (Third) of Trusts, §82 ("trustee has a duty ... to inform beneficiaries of significant changes in their beneficiary status" ... [and keep them] reasonably informed of changes ... particularly material information needed by beneficiaries for the protection of their interests"); Bogert, *The Law of Trusts & Trustees* (rev'd 2d ed.), §544 at 493-96. Contract law likewise recognizes "[a] person's nondisclosure of a fact known to him is equivalent to an assertion that the fact does not exist…where the other person is entitled to know the fact because of a relation of trust and confidence between them." *Res. (Sec.) Contracts* §161.

As Professor Bogert has explained, a defense similar to the "harmless error" defense in *Burke* may be used when there is a breach of the duty to disclose, but that defense is strictly limited: "If the trustee is to uphold the transaction under attack, he must prove that the beneficiary was informed by the trustee of all the facts which would naturally influence the beneficiary to accept or reject the proposal, or that the beneficiary had knowledge of the relevant facts which he had obtained from other sources." Bogert, *Trusts* (6th ed.), §96 at 350.[21]

CIGNA cites Section 173 of the *Restatement Second of Trusts*, but concludes that there is "not a clear set of trust-law rules addressing the remedy for a trustee's failure to inform the beneficiary about the terms of the trust." Br. 27. CIGNA simply ignores an entire line of ERISA cases that have been decided

[21] See also *id*. at 349; Bogert, *Law of Trusts & Trustees*, §544 at 473-79. Consistent with Bogert, when reliance is discussed in connection with a fiduciary duty to disclose, it is often presumed, subject to rebuttal. *See, e.g., Morris v. Wachovia Secs.*, 448 F.3d 268, 282 (4th Cir. 2006) (fiduciary relationship between Morris and Wachovia imposed a duty on Wachovia to disclose material information; when such a duty has "been breached" courts "dispense[]with a requirement of positive proof of reliance"); *Basile v. H & R Block, Inc.*, 729 A.2d 574, 584 (Pa. Super. 1999) (reliance is presumed where fiduciary duty is established); *Edmunds v. Valley Circle Estates*, 20 Cal. Rptr. 2d 701, 708 (Cal. App. 1993); *Thigpen v. Locke*, 363 S.W.2d 247, 252 (Tex. 1963).

under Section 173. In the leading case, *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990), the duty to disclose material information was based on Section 173. Because the participant died while the appeal was pending, detrimental reliance on an undisclosed conversion option would have been impossible to prove. In *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993), the Third Circuit drew on Section 173 and imposed no reliance requirement. A detrimental reliance requirement on the failure to disclose would again have been impossible because the participant died of a heart attack before suit was filed.[22]

In short, like ERISA §102, trust law requires complete and accurate communication of all material terms to beneficiaries. When that duty is breached, a fiduciary can defend by establishing harmless error. But the fiduciary cannot, as Judge Friendly explained, assert that "everything would have been

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[22] Other decisions that rely on Section 173 also focus on what participants "could have done" rather than requiring speculative testimony about what they "would have done." See *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 481 (7th Cir. 2010) (Plaintiff "could have undergone the same surgery elsewhere for less money, postponed the surgery until she and her husband had saved the money to pay for the procedure, or pursued other treatments"); *Griggs v. E.I. DuPont De Nemours & Co.*, 237 F.3d 371, 382 (4th Cir. 2001) ("Armed with that information, Griggs could have made a more informed choice about the form of payment that he wished his TPS benefit to take or about whether he would even participate in the TPS program"); *Krohn v. Huron Mem. Hosp.*, 173 F.3d 542, 551 (6th Cir. 1999) (with disclosure of the longer-term disability benefits, Krohn "could weigh her options and make informed decisions").

the same" and thereby put the beneficiary to his or her proofs.

H. Neither the Material Conflict Standard Nor the Second Circuit's Likely Prejudice/Harmless Error Standard Establishes "Virtual-Strict-Liability."

CIGNA's refrain that permitting recovery without a showing of individual "detrimental reliance" will result in "virtual-strict liability," Br. 23, 25, 35, misapprehends the district court's findings below and ignores the exceptions to liability that the Second Circuit and others have recognized. As set forth above, the district court found that CIGNA foresaw the periods of wear-away and benefit reductions and intentionally failed to disclose them in the summary descriptions. Pet.App.104a-114a, 123a-128a. Requiring CIGNA to provide benefits without the undisclosed periods of wear-away is thus not "strict liability," it simply requires CIGNA to provide the benefits that its disclosures reasonably and foreseeably led participants to expect to receive.

The Second Circuit and other circuits have, moreover, already recognized five situations in which it is *not* appropriate to read statements or omissions in a summary plan description to override the terms of formal plan documents. Those situations include:

(1) Levels of detail not required to satisfy the ERISA §102 standards. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 195-96 (2d Cir. 2007) (SPD was not required to disclose the size of actuarial reduction for "early payment" option); *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1321-22 (9th Cir. 1995) (SPD need not detail specific

mechanics by which benefits may be lost so long as it discloses events or actions); *Stahl v. Tony's Bldg. Materials*, 875 F.2d 1404, 1408 (9th Cir. 1989) (SPD need only be specific enough to communicate risk of loss).

(2) Harmless errors, *e.g.*, when a participant has actual knowledge of the less favorable plan terms. In *Weinreb v. Hospital for Joint Diseases Orthopaedic Institute*, 404 F.3d 167, 171 (2d Cir. 2005); *Tocker v. Philip Morris*, 470 F.3d 481, 489 (2d Cir. 2006); and *Schad v. Stamford Health Sys.*, 2009 WL 4981271, *2, 2009 U.S. App. LEXIS 27939, *6 (2d Cir. Dec. 21, 2009), the defendants successfully rebutted "likely prejudice" with the "harmless error" defense.

(3) Idiosyncratic contingencies that were not foreseeable in preparing the summary description. *See Tocker*, 470 F.3d at 488; *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 9 (2d Cir. 1997); *Lorenzen v. Emples. Ret. Plan of Sperry & Hutchinson Co.*, 896 F.2d 228, 236 (7th Cir. 1990).

(4) Inadequate disclosures that have been corrected on a timely basis. *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 577-78 (3d Cir. 2006) (Exxon "distributed an errata notice, effectively amending the Initial SPD to make it specific and consistent with the Plan provision"); *Frommert*, 433 F.3d at 269 (denying relief to those rehired after 1998 SPD which explained "phantom" offset); *Pierce*, 979 F.2d at 30.

(5) Scrivener's errors shown by clear and convincing evidence. *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 615 F.3d 808, 819 (7th Cir. 2010) (equitable reformation available if "clear and convincing evidence" of scrivener's error "that does

not reflect participants' reasonable expectations of benefits"); *IUE v. Murata Erie N. Am., Inc.*, 980 F.2d 889, 907 (3d Cir. 1992).

In short, under the sensible approaches developed by the courts of appeals, an employer is *not* held responsible for every inadvertent or incomplete statement in an SPD. Here, however, that was not the case: It was "predictable and known" that CIGNA's summaries would mislead employees and be harmful to them, but CIGNA chose to pursue that course of action to avoid an employee "backlash" and advance its own interests.

II. THE COURT SHOULD NOT IMPOSE A DETRIMENTAL RELIANCE REQUIREMENT THAT CONGRESS NEITHER ADOPTED NOR INTENDED.

In enacting ERISA, Congress found prior common law remedies inadequate. It adopted objective disclosure requirements and provided appropriate remedies and ready access to the Federal courts to prevent employers from doing what CIGNA did here. This Court should not impose a detrimental reliance requirement that Congress neither adopted nor intended. CIGNA's proposal would undermine Congress' and this Court's goal that benefit terms be disclosed and uniformly applied so employees receive the benefits for which they have worked.

A. CIGNA's Effort to Imply Detrimental Reliance Based on Analogies to Tort Law and Promissory Estoppel Is at Odds with *Bridge v. Phoenix Bond & Indemnity*.

Sweeping aside the "plan documents rule" and principles of contract and trust law, CIGNA proposes to imply a detrimental reliance standard because of similarities between civil actions based on misleading SPDs and tort actions for misrepresentation. Br. 28. Thus, CIGNA would analogize its deliberate breach of a duty to disclose periods of wear-away tantamount to pay cuts to a stranger's representations about the condition of a product or to a body of law founded on "gratuitous" promises not supported by consideration. *Williston on Contracts* (4th ed.), §§8.1, 8.4., 8.5. Contrary to CIGNA's brief, the closest analogies to ERISA §102 are to contract law because of the consideration provided by the employees' labor and to the duty to disclose under trust law, which offers a harmless error defense but does not require detrimental reliance as part of the case-in-chief.

Even more critically, unlike Section 18 of the Securities Exchange Act of 1934, *codified* at 15 U.S.C. 78r and SEC Rule 10b-5, 17 C.F.R. 240.10b-5(b), which indisputably contain a "reliance" requirement for misleading statements, the ERISA §102 provisions on SPDs and SMMs and the DOL's regulations do not require reliance, nor do they contain any words from which reliance can fairly be implied. The legislative history indicates, moreover, that Congress sought to address the courts' "reluctan[ce]" before ERISA to "disregard technical document wording" in common-law actions, such as for misrepresentation or promissory estoppel.

In *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. at 659, this Court rejected the implication of a detrimental reliance requirement for a civil RICO action because of the similarities between statutory mail fraud and common-law fraud. *Bridge* holds that 18 U.S.C. §§1961-1968 does not require a plaintiff to show first-party reliance on the defendant's alleged misrepresentation to establish a violation. The Court explained:

> If petitioners' proposed requirement of first-party reliance seems to come out of nowhere, there is a reason. Nothing on the face of the relevant statutory provisions imposes such a requirement.

553 U.S. at 648. *Bridge* also ruled that reliance could not come in through the "back door" as an element in establishing proximate cause of the injury:

> Reliance is not a general limitation of civil recovery in tort; it is a specialized condition that happens to have grown up with common law fraud.... That 'specialized condition,' whether characterized as an element of the claim or as a prerequisite to establishing proximate causation, simply has no place in a remedial scheme keyed to the commission of mail fraud, a statutory offense that is distinct from common-law fraud and that does not require proof of reliance.

Id. at 655-56 (citations omitted). Similarly, in *Lyng v. Payne*, 476 U.S. 926, 936 (1986), this Court "reject[ed] petitioners' suggestion that any remedy that can be analogized to an equitable estoppel is necessarily invalid…unless the plaintiff succeeds in proving all the elements of common-law estoppel."[23]

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[23] *Bridge* further rules that even for common-law fraud, Section 548A of the *Restatement (Second) of Torts* "provides only that the plaintiff's loss must be the foreseeable result of *someone's* reliance on the misrepresentation. It does not say that only

Even if the common law action of misrepresentation was more analogous than a contract offer or the trust law duty to disclose, *Bridge* and *Lyng* teach that the primary guide in interpreting statutes is not analogy but text and purpose. Following those precedents, this Court should not imply an individualized reliance requirement that neither Congress nor the Department of Labor intended. Here, the "average plan participant," "reasonably apprise," "might ... reasonably expect," and "material" modification standards used in ERISA and its regulations represent clear choices of objective standards. Legislative and regulatory compromises have already been made in defining those standards and the scope of the available relief. In particular, ERISA's remedies do not allow the consequential or punitive damages awarded in tort actions and ERISA preempts any state law actions to obtain such relief. Since Congress did not require a showing of detrimental reliance and made other considered decisions about the common law elements to incorporate in ERISA, it would not make sense to imply such a requirement in this "reticulated statute." *Russell*, 473 U.S. at 146.

"Lacking textual support" or any anchor for implication in ERISA's purposes, *Bridge*, 553 U.S. at 650, CIGNA turns to the authority of the federal courts to fashion "federal common law." Br. 26-32. But this Court has already held that the "scope of permissible judicial innovation is narrower in areas where other federal actors are engaged" and that

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those who rely on the misrepresentation can suffer a legally cognizable injury." *Id.* at 656 (emphasis in original).

federal common law must be consistent with the policy of the legislation. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831 (2003); *accord Bridge*, 553 U.S. at 659 (rejecting defendant's policy argument that RICO should be interpreted to require reliance "in order to avoid 'over-federalization'" of what traditionally were state-law claims). Here, CIGNA's proposal to require individual detrimental reliance hearings involves an area where the Department of Labor is engaged and a proposal that would clearly "undermine" the statutory objective. *Washington*, 497 F.3d at 457; *Edwards*, 851 F.2d at 137.

B. Requiring Individual Demonstrations of Detrimental Reliance Is Unrealistic and Would Undermine Consistent, Plan-wide Enforcement of ERISA's Disclosure Rules.

Permitting employers to make good on promises in summary plan descriptions only for those individual employees who are able to later prove that they read and detrimentally relied on particular passages clearly shifts the burden of inaccurate drafting of SPDs to participants and is a recipe for undermining uniform, plan-wide relief for violations of ERISA's disclosure rules. CIGNA's argument does, however, go to a core question before this Court: Among the competing standards in the circuit courts of appeals, which standard or standards provides a workable means to advance Congress' goals?

As the district court found here, an employer's self-interest is not always aligned with Congress' desire for accurate and understandable disclosures in SMMs and SPDs: Apart from the legality and the consequences of a violation, "producing affirmatively and materially misleading" summaries may be an effective strategy "to avoid employee backlash," as it was here. Pet.App. 114a. Plainly, letting CIGNA and other employers know that they cannot succumb to the incentive to avoid an employee backlash by withholding information in violation of the law is critical to achieving Congress' objectives.

As a practical matter, the detrimental reliance standard that CIGNA proposes would "herald a return to the pre-ERISA benefits landscape" (CIGNA Br. 36) by offering nearly complete immunity for violating the law: A few extraordinary current or former employees may be able to clear all of CIGNA's hurdles and testify about when they read and how they specifically and detrimentally relied on inadequate disclosures. But this Court and courts of appeal, like the district court here, have repeatedly recognized that detrimental reliance in the form that CIGNA proposes imposes an unrealistic and unfeasible burden in cases involving nondisclosures to thousands of individuals. See, e.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 382 n.5 (1970) ("Proof of actual reliance by thousands of individuals would, as the court acknowledged, not be feasible, ... and reliance on the *nondisclosure* of a fact is a particularly difficult matter to define or prove"); *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988) ("[r]equiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed ..., or if the misrepresentation had not been made" would result in an "unnecessary unrealistic evidentiary burden"); *FTC v. Figgie Int'l*, 994 F.2d 595, 605 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) ("[r]equiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals").

CIGNA's proposal to hold individual "credibility" hearings is also totally unworkable. If each of the 27,000 class members participated, individual hearings would consume *over 10 years* at a rate of 10 witnesses per day testifying before a Federal district judge (or a special master). Even if only 10% participated, the result would be 52 weeks of hearings, with tremendous expense and logistical burdens to have witnesses, including from out-of-state, lined up to testify one after the other.

Moreover, deceased persons, individuals with dementia and other disabilities, and individuals without the resources to travel to New Haven to testify would not have any chance to recover. Ultimately, relief would be limited to a few dozen extraordinary people in Connecticut with memories of reading written material over a decade ago who are adept at handling hypothetical questions (*e.g.*, if CIGNA had disclosed wear-aways to you twelve years ago, what exactly *would* you, as opposed to what *could* you, have done differently?). For the people who are able to clear all the hurdles that CIGNA would put up, there would be no consequential or punitive damages to compensate them or act as a deterrent for CIGNA or other employers against engaging in the same course of conduct. Paying 1%, 2%, or 5% of the participants who were harmed over a decade after the fact will not deter anything or build the standards of honest communication about benefits that Congress wanted.

CIGNA attempts to find a statutory hook for a proposed reading requirement in the language of ERISA §102 describing SPDs as intended to "apprise" participants of their rights under the plan. Br. 12 (citing 29 U.S.C. § 1022). But under ERISA, as in other areas of law involving disclosures, "[p]lan participants who have been provided with an SPD are charged with constructive knowledge of the contents of the document."[24] CIGNA simply ignores those precedents. In construing ERISA §102, moreover, CIGNA drops the word "reasonably" from the statutory language which, in pertinent part, provides that the SPD shall be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." There is no mandatory reading requirement in ERISA §102 or the regulations (nor is there a requirement that employees keep journals to recall what they read a decade earlier).

CIGNA's proposed reading requirement and its assertion that "thousands of plaintiffs … in all

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[24] *Scharff v. Raytheon Co. Short-Term Disability Plan*, 581 F.3d 899, 908 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 3508 (6/28/10) (citing Fifth, Sixth, Eighth, and Eleventh Circuit decisions).

A presumption of reading is common under disclosure laws, whether it favors the plaintiff or the defendant. *See, e.g.*, *Cooper v. Auto Club Ass'n*, 751 N.W.2d 443, 451 (Mich. 2008) ("One is presumed to have read the terms of his or her insurance policy"); *Ackerman v. Wyeth Pharms.*, 526 F.3d 203, 213 (5th Cir. 2008) ("read and heed" presumption "excuses plaintiff from the necessity of making self-serving assertions that he would have followed adequate instructions … and it assists plaintiffs in cases where the person injured has died and evidence of what he would have done is unavailable").

likelihood never read" the summaries is also remarkable for its audacity. A contemporaneous survey *conducted by CIGNA* showed that 92% of participants "thoroughly" read the summaries. JA 895a. Moreover, after listening to the witnesses testify about their memories of reading the summaries, the district court found that CIGNA's proposed requirement that each participant testify about how he or she read the inadequate SPDs over a decade "after the fact" was unrealistic. Pet.App. 169a. Although the 92% figure indicates that CIGNA's employees may be more literate than average, CIGNA's proposal would bar any recovery not only by persons whose memories are not like video recordings, but also recoveries by adults who do not read at a high school or college level but learn by talking to co-workers who review benefit descriptions. [25]

As *Burstein* stated, "just as a court's enforcement of a contract generally does not require proof that the parties to the contract actually read, and therefore relied upon, the particular terms of the contract ... enforcement of an SPD's terms under a claim for plan benefits *does not* require a showing of reliance." 334 F.3d at 381. Even the formation of contracts does

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[25] See *Manginaro v. Welfare Fund of Local 21*, 21 F.Supp.2d 284 (S.D.N.Y. 1998) (Manginaro could have learned about a limitation, if it were disclosed, "from his employer, his co-workers, or the union, even if he never read the SPD himself"); *Estate of Ritzer v. National Org. of Indus. Trade Unions Ins. Trust Fund*, 822 F. Supp. 951, 955 (E.D.N.Y. 1993) ("court could reasonably expect that had the Fund adequately explained the rule in its summary plan description Ritzer would have learned about the retroactive aspect of the rule from co-workers, even if he had not read the plan").

not require that the entire contract be read. *See Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 132 (3d Cir. 1998) (vice-president did not read benefit policies before authorizing amendment); *see also Res. (Sec.) Contracts*, §211, cmt. b.[26]

CIGNA's proposed requirement that each plaintiff prove individually how or she detrimentally relied, for example, how much he or she would have protested or asked for additional compensation if CIGNA had accurately described the plan's benefits, at bottom, calls for speculation. The courts have consistently recognized that testimony about what someone "would have done differently" with disclosure is speculation. *See, e.g.*, *Basic, Inc.*, 485 U.S. at 245; *Washington v. Dept. of Transp.*, 8 F.3d 296, 300 (5th Cir. 1993) (testimony as to what plaintiff "*would have done* had he seen the warning label on the Shop Vac vacuum" excluded because not based on witness' perception but on "self-serving speculation," emp. orig.); *Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1459 (10th Cir. 1990).

CIGNA's proposed testimony is not only speculative, but it ignores the harm to the employees as a group that was caused by CIGNA's misleading disclosures. Obviously, the employee "backlash" that CIGNA was avoiding with its misstatements was not a protest by every single CIGNA employee but a widespread reaction to the takeaways that would have resulted in reconsideration or other changes.

[26] CIGNA shamelessly contends that by denying relief to those who do not testify or who lack a memory of having "actually read" an SPD twelve years ago, it will be "*empowering* employees to know and enforce their rights under their plans." Br. 37 (emph. added).

Here, the district court recognized that "likely harm" is harm to the plaintiff group as a whole: "CIGNA's successful efforts to conceal the full effects of the transition ... deprived plaintiffs of the opportunity to take timely action in response to the purported 'amendment.'" Pet.App. 137a.

In sum, it is not credible that CIGNA's proposed detrimental reliance standard would do no more than sweep aside "unwarranted" recoveries. Br. 38. Instead, it would sweep aside any recovery for tens of thousands of persons who were harmed by disclosures that CIGNA now concedes were "totally inadequate." JA 383a. Saying that all the participants who "truly relied" will be able to clear CIGNA's proposed evidentiary hurdles, Br. 37-38, is like saying that everyone who is telling the truth will be able to walk over hot coals.[27]

CIGNA's assertion that providing benefits without proof of detrimental reliance will result in the production of "needlessly prolix" and "impossible-to-decipher" SPDs (Br. 13, 41) appears to be a thinly veiled threat. As an initial matter, CIGNA makes it sound like the problem with its SPD was that it was not encyclopedic enough, rather than—as the district court found—that CIGNA affirmatively misled

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[27] CIGNA says that participants who "truly relied" are "regularly successful" under a detrimental reliance standard. Br. 39. But in the one reported decision that CIGNA cites, *Dodson v. Woodmen of the World*, 109 F.3d 436 (8th Cir. 1997), the Eighth Circuit actually held that the plaintiff was "prejudiced by the omission" of a time limit in the SPD because he read it and "could not 'get anything out of it.'" 109 F.3d at 439.

employees. As noted above, the circuit courts have not required levels of detail beyond what is required to be found in a summary description that complies with ERISA. If CIGNA is saying that unless it can mislead its employees in SPDs, it will discontinue or not form benefit plans, that is a threat that ERISA soundly rejects.

CONCLUSION

The Court should affirm the judgment of the court of appeals on the question presented by CIGNA.

Respectfully submitted,

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APPENDIX

ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D), provides:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 C.F.R. 2520.102-2 provides:

§ 2520.102-2 Style and format of summary plan description.

(a) Method of presentation. The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross references and a table of contents.

(b) General format. The format of the summary plan description must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

(c) Foreign languages. In the case of either--

(1) A plan that covers fewer than 100 participants at the beginning of a plan year, and in which 25 percent or more of all plan participants are literate only in the same non-English language, or

(2) A plan which covers 100 or more participants at the beginning of the plan year, and in which the lesser of (i) 500 or more participants, or (ii) 10% or more of all plan participants are literate only in the same non-English language, so that a summary plan description in English would fail to inform these participants adequately of their rights and obligations under the plan, the plan administrator for such plan shall provide these participants with an English-language summary plan description which prominently displays a notice, in the non-English language common to these participants, offering them assistance. The assistance provided need not involve written materials, but shall be given in the non-English language common to these participants and shall be calculated to provide them with a reasonable opportunity to become informed as to their rights and obligations under the plan. The notice offering assistance contained in the summary plan description shall clearly set forth in the non-English language common to such participants offering them assistance. The assistance provided need not involve written materials, but shall be given in the non-English language common to these

participants and shall be calculated to provide them with a reasonable opportunity to become informed as to their rights and obligations under the plan. The notice offering assistance contained in the summary plan description shall clearly set forth in the non-English language common to such participants the procedures they must follow in order to obtain such assistance.

Example. Employer A maintains a pension plan which covers 1000 participants. At the beginning of a plan year five hundred of Employer A's covered employees are literate only in Spanish, 101 are literate only in Vietnamese, and the remaining 399 are literate in English. Each of the 1000 employees receives a summary plan description in English, containing an assistance notice in both Spanish and Vietnamese stating the following:

"This booklet contains a summary in English of your plan rights and benefits under Employer A Pension Plan. If you have difficulty understanding any part of this booklet, contact Mr. John Doe, the plan administrator, at his office in Room 123, 456 Main St., Anywhere City, State 20001. Office hours are from 8:30 A.M. to 5:00 P.M. Monday through Friday. You may also call the plan administrator's office at (202) 555-2345 for assistance."

29 C.F.R. 2520.102-3(l) provides:

§ 2520.102-3 Contents of summary plan description.

Section 102 of the Act specifies information that must be included in the summary plan description. The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed. The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in paragraphs (j) through (n):

* * *

(l) For both pension and welfare benefit plans, a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery (e.g., by exercise of subrogation or reimbursement rights) of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section. In addition to other required information, plans must include a summary of any plan provisions governing the authority of the plan sponsors or others to terminate the plan or amend or eliminate benefits under the plan and the circumstances, if any, under which the plan may be terminated or benefits may be amended or eliminated; a summary of any plan provisions governing the benefits, rights and obligations of participants and beneficiaries under the plan on termination of the plan or amendment or elimination of benefits under the plan, including, in the case of an employee pension benefit plan, a summary of any provisions relating to the accrual and the vesting of pension benefits under the plan upon termination; and a summary of any plan provisions governing the allocation and disposition of assets of the plan upon termination. Plans also shall include a summary of any provisions that may result in the imposition of a fee or charge on a participant or beneficiary, or on an individual account thereof, the payment of which is a condition to the receipt of benefits under the plan. The foregoing summaries shall be disclosed in accordance with the requirements under 29 CFR 2520.102-2(b).

29 C.F.R. 2520.104b-3 provides:

§ 2520.104b-3 Summary of material modifications to the plan and changes in the information required to be included in the summary plan description.

(a) The administrator of an employee benefit plan subject to the provisions of part 1 of title I of the Act shall, in accordance with § 2520.104b-1(b), furnish a summary description of any material modification to the plan and any change in the information required by section 102(b) of the Act and § 2520.102-3 of these regulations to be included in the summary plan description to each participant covered under the plan and each beneficiary receiving benefits under the plan. Except as provided in paragraph (d) of this section, the plan administrator shall furnish this summary, written in a manner calculated to be understood by the average plan participant, not later than 210 days after the close of the plan year in which the modification or change was adopted. This disclosure date is not affected by retroactive application to a prior plan year of an amendment which makes a material modification to the plan; a modification does not occur before it is adopted. For example, a calendar year plan adopts a modification in April, 1978. The modification, by its terms, applies retroactively to the 1977 plan year. A summary description of the material modification is furnished on or before July 29, 1979. A plan which adopts an amendment which makes a material modification to the plan which takes effect on a date in the future must disclose a summary of that modification within 210 days after the close of the plan year in which the modification or change is adopted. Under the authority of sections 104(a)(3) and 110 of the Act, a summary description of a material modification or change is not required to be disclosed if it is rescinded or otherwise does not take effect. For example, a calendar year plan adopts a modification in June, 1978. The modification, by its terms, becomes effective beginning in plan year 1979. Before the beginning of plan year 1979, the prospective modification is withdrawn. No summary of the material modification is required to be disclosed.

(b) The summary of material modifications to the plan or changes in information required to be included in the summary plan description need not be furnished separately if the changes or modifications are described in a timely summary plan description. For example, a calendar year plan adopts a material modification on June 3, 1976. The modification is incorporated in a summary plan description furnished on July 15, 1977. No separate summary of the material modification is furnished. The plan adopts another material modification September 15, 1977. A separate summary of the modification is furnished on or before July 29, 1978.

(c) The copy of the summary plan description furnished in accordance with §§ 2520.104b-2(a)(1)(i) and 2520.104b-4 shall be accompanied by all summaries of material modifications or changes in information required to be included in the summary plan description which have not been incorporated into that summary plan description.

(d) Special rule for group health plans--

(1) General. Except as provided in paragraph (d)(2) of this section, the administrator of a group health plan, as defined in section 733(a)(1) of the Act, shall furnish to each participant covered under the plan a summary, written in a manner calculated to be understood by the average plan participant, of any modification to the plan or change in the information required to be included in the summary plan description, within the meaning of paragraph (a) of this section, that is a material reduction in covered services or benefits not later than 60 days after the date of adoption of the modification or change.

(2) 90-day alternative rule. The administrator of a group health plan shall not be required to furnish a summary of any material reduction in covered services or benefits within the 60-day period described in paragraph (d)(1) of this section to any participant covered under the plan who would reasonably be expected to be furnished such summary in connection with a system of communication maintained by the plan sponsor or administrator, with respect to which plan participants are provided information concerning their plan, including modifications and changes thereto, at regular intervals of not more than 90 days and such communication otherwise meets the disclosure requirements of 29 CFR 2520.104b-1.

(3) “Material reduction”.

(i) For purposes of this paragraph (d), a “material reduction in covered services or benefits” means any modification to the plan or change in the information required to be included in the summary plan description that, independently or in conjunction with other contemporaneous modifications or changes, would be considered by the average plan participant to be an important reduction in covered services or benefits under the plan.

(ii) A "reduction in covered services or benefits" generally would include any plan modification or change that: eliminates benefits payable under the plan; reduces benefits payable under the plan, including a reduction that occurs as a result of a change in formulas, methodologies or schedules that serve as the basis for making benefit determinations; increases premiums, deductibles, coinsurance, copayments, or other amounts to be paid by a participant or beneficiary; reduces the service area covered by a health maintenance organization; establishes new conditions or requirements (e.g., preauthorization requirements) to obtaining services or benefits under the plan.

(e) Applicability date. Paragraph (d) of this section is applicable as of the first day of the first plan year beginning after June 30, 1997.

(f), (g) [Reserved]